KING COUNTY
COLLABORATIVE LAW

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Bellevue, WA 98004

June 21, 2013

VIA MAIL AND
EMAIL TO Denise.Foster@courts.wa.gov

Hon. Barbara Madsen, Chief Justice
Hon. Charles Johnson, Associate Chief Justice
c/o Clerk of the Court
Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: *Proposed Uniform Collaborative Law Rules*

Dear Chief Justice Madsen, Justice Johnson,
and Justices of the Supreme Court:

Thank you for soliciting comments to the proposed Uniform Collaborative Law Rules (the "Proposed Rules"). Although King County Collaborative Law[1] greatly appreciates the efforts to recognize the growing practice of Collaborative Law throughout the State, for the reasons stated below we ask that the Proposed Rules not be adopted. The Proposed Rules do not accomplish

[1] King County Collaborative Law (KCCL) is a non-profit association of independent collaborative law practitioners – lawyers, financial experts, child specialists, coaches, and other professionals. Our members and clients are those who are the most directly affected by the Proposed Rules. KCCL took a leading role in seeking the enactment of the UCLA by the Legislature, and opposed the WSBA's attempts to strike large portions of the UCLA in favor of the Proposed Rules. There are roughly 230 Collaborative Law professionals (lawyers and non-lawyers) currently practicing throughout Washington, and multiple local and statewide Collaborative Law specialty bar associations. With over 120 members, KCCL is the largest specialty bar association in Washington that focuses solely on Collaborative Law. KCCL has a strong interest in maintaining the robustness, integrity, and quality of Collaborative Practice. Learn more about KCCL at www.kingcountycollab.org.

anything beneficial. Additionally, adopting the Proposed Rules would be **contrary to public policy** and create **unintended consequences.**[2]

We are informed that on May 8, 2013, the **Washington Uniform Law Commission took the position that the UCLA as enacted should simply be left alone, and that the Supreme Court should not adopt the Proposed Rules.**

The WSBA Rules Committee also raised concerns. Attached as Exhibit 1 is a copy of the Rules Committee's report to the Board of Governors (BOG), which at page 2 states:

> The [WSBA Rules] Committee ... recognizes that the draft Rules represent an agreed-upon compromise; however, ***the Committee was far from unanimous that it is necessary to enact a whole new subset of rules,*** *and believes a strong argument could be made for simply amending the RPCs and other existing rules as necessary to accommodate the proposed legislation.*

(Emphasis added.)

Instead of a lengthy set of rules that essentially mimics an existing statute, we ask that you establish a committee to make recommendations for a limited number of narrowly drafted rules that serve solely to implement the UCLA. At a minimum, that committee should include representative stakeholders who would be affected by any rules, so that any rules are responsive to the needs of Collaborative practitioners and the courts alike. Such stakeholders would presumably include affected judicial officers, court administrators, and Collaborative Law organizations. The inclusion of Collaborative Law specialty bar associations is essential because no organized group within the WSBA has the necessary depth of expertise in the practice of Collaborative Law in Washington.[3]

A. There Is No Need for this Set of Proposed Rules.

Subsequent to April 5, 2013 (the date the Proposed Rules were ordered to be published for comment), the Legislature passed the Uniform Collaborative Law Act ("UCLA"), to be codified as a new chapter of Title 7 RCW, "Special Proceedings and Actions." A copy of the session law, ch. 119, Laws of 2013, is attached.

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[2] The GR 9 cover sheet is incorrect, in that all known specialty bar associations whose members actually practice Collaborative Law oppose the Proposed Rules. Prior to the Legislative session, an early draft of these rules was discussed as part of a compromise; that compromise fell apart when the key part was rejected by the BOG at its November 2012 meeting prior to the start of the Legislative session. In the 2012 and 2013 legislative sessions, KCCL has consistently opposed the Proposed Rules because they are bad public policy.

[3] Collaborative Law stakeholders would include various county organizations, such as King County Collaborative Law, Collaborative Professionals of Washington, and the Collaborative Law Section of King County Bar Association. KCCL will be happy to provide a more comprehensive list of Collaborative Law organizations that would be affected by rules and stakeholders.

The Proposed Rules are essentially a carbon copy of 11 sections of the UCLA as enacted. **The Proposed Rules are redundant of the UCLA and therefore unnecessary**. They provide no added benefit to anyone.

KCCL does not know of any precedent for cutting and pasting large portions of an enacted statute into court rules—particularly for a process that by definition does not involve the courts. There was no cutting and pasting into court rules large portions of the Uniform Arbitration Act, ch. 7.04A RCW (UAA). Similarly, the Uniform Mediation Act, ch. 7.07 RCW (UMA), also remains intact. The UAA, UMA, and UCLA were all enacted by the Legislature as special proceedings. **It makes no sense to create a new precedent by treating Collaborative Law differently from the other existing non-court special proceedings.**

It is a waste of resources to simply duplicate what already exists in statute. Civil Rule 81(a) delegates rules for special proceedings to the Legislature. CR 81(a) provides in part: "***Except*** where inconsistent with rules or ***statutes applicable to special proceedings***, these rules shall govern all civil proceedings." (Emphasis added). "What constitutes a 'special proceeding' is mostly governed by statute." *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 716, 261 P.3d 119 (2011). Because Section 23 of the UCLA designates it as a special proceeding, **the Proposed Rules more properly belong in the statute, rather court rule, per CR 81(a).** Because statutes applicable to special proceedings may govern procedures, the Proposed Rules are inherently unnecessary.

B. The Proposed Rules Run Contrary to Public Policy.

1. Court Rules Should Not Be Adopted for a Non-Court ADR Process that Often Involves Non-Lawyers.

Collaborative Law is a voluntary ADR process entered into by a contract called the Participation Agreement. UCLA Sec. 4. While the UCLA requires that each party have a lawyer, the lawyers are generally prohibited from appearing in court on any contested issue. UCLA Sec. 9. The reason is because the purpose of Collaborative Law is to avoid having disputes decided by the courts. Like mediation, Collaborative Law is designed to be a non-court process. Wholesale court procedural rules are not normally adopted for proceedings that do not typically involve the courts.[4]

There exist only four conceivable circumstances when there could be any involvement of the courts in a Collaborative Law case: (1) in matters that require the entry of a court order to ratify the parties' agreement (for example, a decree of dissolution of marriage); (2) if an action was filed prior to the commencement of a Collaborative Law proceeding which needs to be dismissed or stayed; (3) in the rare circumstance when a subpoena is needed to obtain information from a third party; (4) in the rare circumstance when an emergency order needs to be obtained to preserve the health, safety, or welfare of a party before a substitute lawyer becomes available. **As a non-court process, where court involvement is minimal or nonexistent, it makes no sense**

[4] An exception being CR 53.4, which was adopted specifically after RCW 7.70.100(4) directs the adoption of court rules and standards for the court rules. The UCLA contains no such directive or request by the Legislature.

to adopt a comprehensive set of court rules. What rules might be eventually drafted and adopted should be narrowly tailored to fit the very narrow intersection that might occur between Collaborative Law and the courts.

Additionally, non-lawyers are commonly integrated into the Collaborative process. In family law matters, neutral financial specialists, neutral child specialists, and neutral or allied divorce coaches are commonly integrated, whether or not those cases result in any court involvement. In King County, it is likely that a majority of Collaborative Law cases involve non-lawyers. It is questionable whether any court rules could apply to non-lawyers who are commonly integrated into the Collaborative Law process, particularly in the large numbers of cases when there is no pending court proceeding. Unlike the Proposed Rules, there can be no question that the UCLA, as a statute, applies to such non-lawyer participants.

2. The Proposed Rules Do Not Adequately Address How to Implement the UCLA.

KCCL would support narrowly drafted rules that focus on either the regulation of the practice of law or court procedure. By simply parroting large portions of a statute, the Proposed Rules fail to provide guidance as to either professional conduct or court procedure. That is because the purpose for the Proposed Rules was never to implement the UCLA, but instead as a political move to persuade the 2013 Legislature to strike large parts of the statute as occurred in 2012.[5] (*See* discussion below.)

There are a few narrow areas where court rules to implement the statute could be helpful. Most notably, UCLA § 6 provides that if parties commence the Collaborative Law process after a court action has been commenced, the filing of a notice operates as an application for a stay. A court rule on how to handle this situation procedurally could be useful. However, the various Collaborative Law specialty bar associations around the state should be involved in any such effort.

C. Moving Large Parts of the UCLA Wholesale into Rule Form Would Create Unintended Consequences.

1. It Is Bad Public Policy to Have an Otherwise Comprehensive Law Split Into Different Places, Such As Between Court Rule and Statute.

The WSBA has stated that its intention is that adoption of these Proposed Rules is a stepping stone to repeal large portions of the UCLA. Doing so would not only be bad public policy, but lead to unintended consequences.

The UCLA is a comprehensive and cohesive act. If 11 of its 19 sections (or any large proportion) are moved from statute to court rules, then the essence of the whole act could only be ascertained by those who happen to know to look in both places. KCCL does not know of any other area of

[5] *See* legislative history in the Senate Judiciary Committee for HB 2196 in the 2012 legislative session. HB 2196 died.

law where the entirety of the substance cannot be ascertained unless one looks both at statute and court rules. The UCLA and precepts of Collaborative Law embodied therein would not make sense and lack meaning for the public if these sections are removed. See UCLA § 2.

Breaking a comprehensive and cohesive law into a two-headed creature can only create confusion for lawyers, judges, and the public. It would create a trap for the unwary, and especially lawyers who wish to advise their clients about the option of Collaborative Law.

2. *The Legislatures of Every Other State Have Rejected the Approach that the BOG Desires.*

By enacting the UCLA entirely in statute form, the Legislature followed the approach taken by every other jurisdiction. The UCLA has been adopted in six jurisdictions besides Washington, and has been introduced in six more states. Every other jurisdiction has enacted the UCLA in statute form, rather than the broken rule-statute hybrid that the BOG proposes. The chart below summarizes the status of the UCLA in different states as of this writing:

	Jurisdiction	Status	Citation
1	Dist. of Columbia	Enacted	DC Official Code, Chapter 40: UCLA
2	Hawaii	Enacted	Hawaii Revised Statutes, codification pending, HB 626 (2011)
3	Utah	Enacted	Utah Code Secs. 79B-19-101 et seq.
4	Texas	Enacted	Texas Family Code Title 1A, Sex 15.001 et seq.
5	Nevada	Enacted	Nevada Revised Statutes, Secs. 38.400 et seq.
6	Ohio	Enacted	Ohio Revised Code, Secs. 3105.41 et seq.
7	Washington	Enacted	SHB 1116; codification pending
8	Alabama	Enacted	HB 396, Act no. 2013-355
9	New Mexico	Introduced	SB 401
10	Illinois	Introduced	HB 1029 & HB 1239 & SB 31
11	Massachusetts	Introduced	H.34
12	Oklahoma	Introduced	SB 238
13	South Carolina	Introduced	H. 3715

Every state so far has enacted the UCLA <u>entirely by statute</u> with no court rules, with the following very narrow exceptions:

> In Utah, only the "disqualification provision" (§ 9 of the UCLA) is set forth in court rule.[6]
> In Alabama, only the privilege will be set forth in court rule.[7]

[6] Utah Judicial Council Rules of Judicial Administration, Rule 4-510.01(4). Utah's court rule was adopted several years prior to the UCLA and was simply retained.
[7] In Alabama, privileges are set forth in the Rules of Evidence rather than in statute. *Cf.* Alabama Rules of Evidence 501-512A.

The bottom-line is that no state has made the type of sweeping alteration to the UCLA that the BOG is proposing—breaking the statute to move half its sections wholesale into court rule. Instead, every other state that has considered the issue has adopted the UCLA entirely in statute form; except for Alabama where only the privilege will be in a court rule and Utah where only the disqualification provision is in a court rule.

3. The Proposed Rules Are the Result of a Decision Made Without Adequate Process.

The genesis of the Proposed Rules was a decision made at the December 2011 BOG meeting, where the BOG lacked input from any Collaborative Law specialty bar association or practitioner.[8] The minutes from the December 2011 BOG meeting reflect that some raised a concern about "separation of powers." In response, the BOG passed a motion to "... oppose the proposed legislation regarding collaborative law to the extent it interferes with the practice of law." *See* Attachment 3.

In fact, the UCLA does not "interfere with the practice of law." By its express terms, the UCLA respects the role of the Supreme Court in regulating the practice of law. *See* UCLA § 12.

Although the BOG may also have feared a separation of powers issue, in fact none is created by the UCLA. A separation of powers issue arises under the Constitution only if there is an irreconcilable conflict between a court rule and a statute on a procedural matter.

> "*The legislature may also adopt, by statute, rules governing court procedures*. 'If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both.' *Putman v. Wenatchee Valley Med. Ctr., PS,* 166 Wn.2d 974, 980, 216 P.3d 374 (2009). If the statute and the rule 'cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters.' *Id.*"

State v. Gresham, 173 Wn.2d 405, 428-29, 269 P.3d 207 (2012) (emphasis added).

> "We emphasize that ***the legislature has wide latitude in establishing rules for the courts, both procedural and substantive***. ... Only in those rare cases where a legislative enactment [1] irreconcilably conflicts with a court rule and [2] the rule is procedural in nature will we invalidate the enactment."

Id. at 434 (emphasis added).

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[8] None of the Collaborative Law specialty bar associations (such as KCCL and Collaborative Professionals of Washington) were invited or notified that the BOG would be considering this matter, nor consulted. As a result, the Collaborative Law bar did not have an opportunity to provide information, participate in the discussion, or respond to opponents of Collaborative Law who were present and advocated for court rules to the BOG.

Since there are no existing court rules concerning Collaborative Law, the UCLA does not create a separation of powers concern. Consequently, per the case law, **a separation of powers issue could only arise should you adopt rules that irreconcilably conflict with the UCLA.**

4. The Proposed Rules Could Create Additional Unintended Consequences for the Court.

The December 2011 BOG resolution resulted in heavy lobbying in the 2012 and 2013 legislative sessions to strike and move large parts of the UCLA into court rules—the Proposed Rules that are now under consideration. The legislative history reflects that with a very clear understanding of the issue, **the 2013 Legislature intentionally rejected the BOG's position and adopted the UCLA entirely in statute form.** *See* Attachment 4.

Although the Legislature has rejected the WSBA's efforts to break the UCLA into two, the WSBA intends to try again during the 2014 legislative session, using the adoption of the Proposed Rules as a reason to repeal large parts of the UCLA. KCCL is concerned that the WSBA's strategy is unwise because it could add to the tension between the judicial and legislative branches of government.

The reaction of the Legislature to the adoption of the Proposed Rules and WSBA's strategy cannot be known. However, **adopting the Proposed Rules could be perceived by some as provocative, because the Legislature made the policy decision to reject the BOG's approach and enact the UCLA entirely in statute form.** Adopting the proposed rules creates a real risk of drawing the Court into an unnecessary conflict with the Legislature.

CONCLUSION

More than any other stakeholders, Collaborative Law practitioners and their clients will be most affected by the Proposed Rules should they be adopted. To our knowledge, all Collaborative Law specialty bar associations in the state oppose the adoption of the Proposed Rules.

The Washington Uniform Law Commission opposes adopting the Proposed Rules, as does the WSBA Rules Committee, which concluded that the Proposed Rules are not needed and that amendments to existing rules would be a better approach.

The Legislature rejected the BOG's efforts to strike large parts of the UCLA so they could be placed into court rules.

The better course is to convene a court committee to draft narrow Proposed Rules to implement the Uniform Collaborative Law Act, which would include the participation of the stakeholders who are most affected by rules affecting Collaborative Law, most notably the Collaborative Law specialty bar associations and experienced Collaborative Law practitioners.

Thank you for the opportunity to comment on the Proposed Rules and for your consideration of these comments.

Respectfully yours,

KING COUNTY COLLABORATIVE LAW

Loretta S. Story

By: Loretta Story, President

Comments approved per Board resolution and prepared by the KCCL Legislative Committee:

J. Mark Weiss, chair
Stanley Cole
Michael Fancher
Kirsten Hytopoulis
Mary Sakaguchi
Courtney Story
Loretta Story
Sara Wahl

Attachments:

1. Rules Committee Report to the BOG
2. Uniform Collaborative Law Act session law
3. Excerpt from December 2011 BOG Meeting Minutes
4. (a) 2013 House Judiciary Report summarizing WSBA testimony, and excerpt from (b) March 8, 2013, BOG meeting minutes.